IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. BROWN

STATE OF NEBRASKA, APPELLEE,
V.
MIKE L. BROWN, APPELLANT.

Filed May 8, 2012. No. A-11-917.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed as modified, and cause remanded for further proceedings.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Mike L. Brown appeals from his plea-based conviction for possessing a firearm while in violation of Neb. Rev. Stat. § 28-416(1) (Reissue 2008) (delivery of or possession with intent to deliver marijuana), a Class II felony. Brown was sentenced to imprisonment for 1 to 2 years. On appeal, Brown challenges the sentence imposed by the district court. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), this case was submitted without oral argument. Although we find no abuse of discretion in the sentence of imprisonment imposed, we find that the district court erred in failing to give Brown credit for time previously served in jail. Accordingly, we affirm the sentence imposed by the district court, as modified, and remand the matter for further proceedings to determine the credit to which Brown is entitled.

BACKGROUND

On June 11, 2010, the State filed an information in the district court for Lancaster County, charging Brown with delivery of, or possession with intent to deliver, marijuana in

violation of § 28-416(1), a Class III felony, and with possession of a firearm during the commission of a felony in violation of Neb. Rev. Stat. § 28-1205(2) (Cum. Supp. 2010), a Class II felony. An amended information was filed on November 10, which added three counts of possession of a controlled substance in violation of § 28-416(3), all Class IV felonies, to the charges in the original information.

On August 17, 2011, Brown pled guilty to knowingly or intentionally possessing a firearm while in violation of § 28-416(1), a Class II felony. The remaining charges were dismissed. The court accepted Brown's plea and ordered a presentence investigation. Because the record on appeal does not contain a bill of exceptions for the plea hearing, we have not set forth the details of any factual basis provided by the State at the hearing. However, the presentence report (PSR) indicates that on May 7, 2010, law enforcement personnel obtained information that a substantial amount of marijuana was located at a particular address. While executing a narcotics search warrant at the residence, investigators located marijuana, hydrocodone pills, two handguns, and assorted drug paraphernalia in Brown's bedroom. A total of approximately 562 grams of marijuana was located on the property. Brown's son was also arrested in connection with the present offense.

A sentencing hearing was held before the district court on October 26, 2011. Brown's attorney asked that certain correspondence from both Brown and himself be incorporated into the PSR, which the court did. The prosecutor, Brown, and his attorney each informed the court that there were no other additions, corrections, or deletions to be made to the PSR. Both the prosecutor and Brown declined the opportunity to make further comments to the court, and Brown's attorney informed the court that his arguments were all incorporated into the correspondence previously accepted by the court.

In sentencing Brown, the court first indicated that it had reviewed the PSR and all submitted materials. The court noted Brown's good employment history and lack of a criminal record, which the court found difficult to reconcile with the seriousness of the offense with which Brown was charged, the likelihood that Brown was aware that drugs were being sold from his home, and Brown's reluctance to speak about the circumstances of the crime, which suggested to the court the possibility that Brown was protecting others who were dealing drugs out of his home. The court also noted Brown did not believe that he required rehabilitation, and accordingly, the court did not consider him amenable to a probationary sentence. The court also stated that the offense--"drug dealing and guns happening in [Brown's] house"--was simply too serious to consider placing him on probation.

After concluding that probation was inappropriate, the court sentenced Brown to imprisonment for a period of 1 to 2 years, stating that there was no credit for time previously served. Neither party objected to or raised any issue regarding the court's pronouncement concerning credit for time served. Brown subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Brown asserts that (1) the sentence imposed by the district court was invalid, (2) the district court abused its discretion in failing to grant probation, and (3) the district court abused its discretion by imposing a cruel and unusual punishment and excessive sentence.

STANDARD OF REVIEW

Whether a defendant is entitled to credit for time served is a question of law. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

ANALYSIS

Credit for Time Served.

Brown asserts that the sentence imposed by the district court was invalid. Brown argues that the court should have given him credit for 1, 2, or 4 days of time served and that because the court failed to do so, his sentence is in violation of Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008) and thus invalid.

Section 83-1,106(1) provides:

> Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.

Under § 83-1,106(1), "in custody" means judicially imposed confinement in a governmental facility authorized for detention, control, or supervision of a defendant before, during, or after trial on a criminal charge. *State v. Becker*, 282 Neb. 449, 804 N.W.2d 27 (2011). A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled. *State v. Sing*, 275 Neb. 391, 746 N.W.2d 690 (2008).

The record shows that Brown was arrested at 4 p.m. on May 13, 2010, at which time he was taken into custody and lodged in the county jail. Brown's court appearance was scheduled for May 14 at 2 p.m., and the record contains a journal entry and order, containing the computer printed notation "Printed on 5/14/2010 at 2:12," which shows that Brown bonded out of jail on May 14. Brown draws our attention to the appearance bond form found in the transcript. The appearance bond is a form document with the computer printed date of "May 14, 2010" next to the blank line for the defendant's signature. In addition to signing the form and filling in the appropriate blank lines with his date of birth and address, Brown also wrote by hand the date of "5-15-10," which handwritten date appears in the blank date line next to the line for the signature of a surety. The appearance bond was not signed by a surety, and a slash appears through the surety's signature line. Brown also notes the file stamp from the county clerk's office, which shows that the appearance bond was file stamped on May 17. We note that the section of the PSR for "Days in Jail" states, "0 Days Credit."

It is clear that Brown spent some time in jail for these charges between the time of his arrest and being bonded out. As such, Brown was entitled to receive credit. See *State v. Banes*,

268 Neb. 805, 688 N.W.2d 594 (2004) (credit given between arrest and date defendant posted bond). Brown argues that he was entitled to either 1 day's credit (using the May 14 journal entry and order), 2 days' credit (using the date he placed next to his signature on the appearance bond), or 4 days' credit (using the date the appearance bond was file stamped). The State argues, using the May 14 journal entry and order, that Brown spent less than 24 hours in jail before bonding out, suggesting that he was not entitled to any credit. However, there is nothing in the statute which places a minimum period of time on credit. See, also, *State v. Fitch*, 255 Neb. 108, 582 N.W.2d 342 (1998) (although not issue on appeal, defendant was given credit for 10 hours served).

We conclude that the district court erred in not awarding Brown credit for time served. On remand, the district court is directed to determine the credit to which Brown is entitled.

Sentence.

Brown asserts that the district court abused its discretion in failing to grant probation. He also asserts that the district court abused its discretion by imposing a cruel and unusual punishment and excessive sentence.

Brown was convicted of one count of possessing a firearm while in violation of § 28-416(1), a Class II felony, punishable by 1 to 50 years' imprisonment. See § 28-416(16) and Neb. Rev. Stat. § 28-105 (Reissue 2008). Brown's sentence to imprisonment for 1 to 2 years is within, and at the low end of, the statutory guidelines.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

The PSR shows that Brown was 52 years old at the time he was sentenced. He has been employed by the same employer for 24 years. His prior criminal history consists of traffic violations. Although Brown admitted to personal marijuana use, he did not believe that he had a drug problem or needed treatment. Brown was evasive with the probation officer about his involvement in the present offense, which led the probation officer to question whether probation would be appropriate. Brown scored 20 on the level of service/case management inventory, which shows that he has a high risk to reoffend.

The sentence of incarceration was appropriate in this case. The record does not support a conclusion that Brown would respond affirmatively to probationary treatment. And, the district court correctly considered the seriousness of the offense. The district court did not abuse its discretion by failing to grant probation.

Further, the district court did not impose an excessive sentence. Brown's sentence was within, and at the low end of, the statutory guidelines. He benefited from the generous plea

agreement. In exchange for Brown's plea, the State dismissed four of the felonies charged in the amended information. This assignment of error is without merit.

Finally, although Brown asserts that his sentence was cruel and unusual, he does not challenge the facial validity of the statutes under which he was convicted and sentenced. To the extent that Brown is arguing that the sentence "as applied" to him constitutes cruel and unusual punishment, it involves the same considerations as his claim of excessive sentence. See *State v. Robinson*, 278 Neb. 212, 229, 769 N.W.2d 366, 378 (2009) (concluding that defendant's "'as applied' challenge" based on cruel and unusual punishment clauses involved same considerations as excessive sentence claim). We have already concluded that Brown's sentence was not excessive. Likewise, we conclude that his sentence was not so disproportionate to his crime as to constitute cruel and unusual punishment.

CONCLUSION

The court did not abuse its discretion by failing to grant probation and did not impose an excessive sentence. Brown's sentence did not constitute cruel and unusual punishment. However, the district court erred in failing to grant Brown credit for time previously served. Accordingly, we affirm the sentence imposed by the district court, as modified, and remand the matter for further proceedings to determine the credit to which Brown is entitled.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.